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No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1959

CITY OF CORINTH, MISSISSIPPI, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. A, pp. 17–20) is reported at 268 F. 2d 10. The unreported Federal Power Commission order appears at R. 197–201 and is set out in Appendix B to the petition at pages 21–25.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1959 (Pet. App. E, p. 34). The petition for a writ of certiorari was filed on September 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does a court of appeals, on petition to review an interlocutory order of the Federal Power Commission allowing a pipeline rate increase to go into effect subject to refund, have jurisdiction to decide whether the pipeline's contract with a customer permits the filing of such unilateral rate change, where the Commission has not yet interpreted the contract upon which its authority to grant the increase depends?[1]

STATUTE INVOLVED

Sections 4 and 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)) are set forth in Appendix D of the petition at pages 28–32.

STATEMENT

Petitioner, a municipality engaged in the local distribution of natural gas, is served by Alabama-Tennessee Natural Gas Company, a Commission-regulated interstate pipeline. Alabama-Tennessee sells gas under the usual filed-tariff arrangement, which includes both general rate schedules and service-agreements with particular customers. The service-agreement with petitioner appears at R. 7.

In January 1957, Alabama-Tennessee filed, pursuant to Section 4(d) of the Natural Gas Act (15 U.S.C. 717c(d)), an increase in the rates applicable to petitioner (R. 107–163). The Commission

[1] Should certiorari be granted, we reserve the right also to argue, as we did below, that petitioner is not a "party" entitled to review under Section 19 of the Natural Gas Act because of its failure to intervene in the rate proceeding prior to applying to the Commission for rehearing.

promptly requested petitioner's comments on the filing, pursuant to Section 154.27 of its Regulations, 18 CFR 154.27 (R. 165–167). Petitioner replied by letter protesting the rate increase on the grounds that it had not been shown to be reasonable, and requesting that the Commission suspend the increase and set the matter for hearing (R. 186–188). On February 13, 1957, the Commission did order the increased rate to be set for hearing pursuant to Section 4(e) of the Act (15 U.S.C. 717c(e)), and suspended it for the maximum period of five months (R. 189–192).

At the conclusion of the five-month suspension period, Alabama-Tennessee moved to place the rate in effect subject to refund, as provided by Section 4(e) of the Act (R. 192). Under that section, the Commission on July 18, 1957, permitted the increased rate to go into effect subject to refund, and also imposed provisions to assure payment of any refunds that might become due (R. 197–201).

Petitioner did not follow its informal protest, which requested that the rate be set for hearing, with a formal attempt to intervene in the Commission proceedings.[2] Instead, petitioner, on August 19, 1957, attempted to file an application for rehearing of the July 18 order, contending for the first time that the

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[2] The Commission's Regulations provide for informal protests which are "given such consideration as their contents and nature warrant." 18 CFR 1.40(b)(1). Petitioner's letter appearing at R. 186–188 was such a protest, merely advising the Commission in the exercise of its summary power to suspend rate changes. The same regulation points to the additional procedure necessary in order to intervene in a case. 18 CFR 1.10(d); see also 18 CFR 1.1(f) (13) and (14).

Commission lacked authority to accept the increased rate for filing (R. 207-211). The Commission's Secretary rejected the application for rehearing on the grounds that petitioner was not a party to the proceeding and that the challenged order was interlocutory, so that petitioner was not entitled to apply for rehearing under the Act and the Regulations (R. 212).

The Court of Appeals held that the Commission's order placing the increase in effect subject to refund was "interlocutory, procedural and ministerial and that the grounds * * * asserted should first be considered and passed upon by the Commission." 268 F. 2d 10, 12 (Pet. App. 20).

ARGUMENT

The petition presents no question which calls for consideration by this Court. The Court of Appeals was correct in adhering to the elementary principle that a court will not undertake interlocutory review of a question upon which the administrative agency has not yet passed. *Federal Power Commission* v. *Arkansas P. & L. Co.*, 330 U.S. 802.

The order here complained of is not "of a definitive character dealing with the merits of a proceeding". *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384. It does not determine whether the Federal Power Commission has authority to grant Alabama-Tennessee a rate increase.[3] The question of

[3] Petitioner's contention to the contrary (Pet. 14) is mistaken. Not only is the order complained of silent as to issue of authority to act upon the filing, but petitioner failed to raise that question until the order had already issued.

Commission power over the subject matter may always be raised before the Commission and is regularly decided in numerous proceedings. Here, that determination will turn upon a contract interpretation (of the service-agreement between Alabama-Tennessee and petitioner) which is "peculiarly within the area of the Commission's special competence". *United Gas Pipe Line Co.* v. *Memphis Gas Div.*, 358 U.S. 103, 114.

The claimed conflict between circuits (Pet. 6–10) does not exist. The challenged order represents a preliminary stage of a rate proceeding which will culminate in a final, reviewable, order. The order held reviewable in *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (C.A. 10), certiorari denied *sub nom. Magnolia Petroleum Company* v. *Cities Service*, 358 U.S. 837, permitted the filing of a non-suspendible rate, there being neither provision for subsequent hearing nor any refund undertaking.[4] The order permitting filing concluded that matter; in this case, on the other hand, the order merely constitutes an early step in a pending proceeding which will continue.

Even an interlocutory order may be reviewable as to questions which the Commission has determined. See *Memphis Light, G. & W. Div.* v. *Federal Power Commission*, 250 F. 2d 402 (C.A.D.C.), reversed on other grounds *sub nom. United Gas Pipe Line Com-*

[4] *Cities Service* involved a first filing (made pursuant to the Commission's 174 Series orders implementing Section 4(e), following *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672), not, as here, a suspendible rate change filed under 4(d), to be followed by a rate hearing and determination.

pany v. *Memphis Gas Div.*, 358 U.S. 103.[5] But the Court of Appeals here properly refused to usurp the Commission's function of initially determining its own jurisdiction.[6]

[5] Thus, the rate suspension order in *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470 (C.A. 10), certiorari denied *sub nom. Michigan Wisconsin Pipe Line Company* v. *Phillips*, 350 U.S. 1005, was held reviewable because it not only suspended a rate change but also fixed the rate for June 7, 1954 (the date of this Court's *Phillips* decision which the Commission took as the beginning of its regulation of independent producers).

And *Sun Oil Company* v. *Federal Power Commission*, 266 F. 2d 222 (C.A. 5), petition for writ of certiorari pending, No. 321, October Term, 1959, also involved review of determinations the Commission had in fact made. Sun sought review of two Commission actions, raising identical questions as to each. Sun rendered a certificated service; its gas sales contract had expired. The Commission's first action rejected an attempted filing of a new contract as an initial rate, and did pass upon the questions later raised on review. The second action suspended and set for hearing that same contract when subsequently filed as a rate change. In the Court of Appeals, the Commission argued prematurity as to both actions, but on different grounds. It is not clear whether the Fifth Circuit rejected that argument as to the suspension order as well as the previous action rejecting the attempted filing. We assume that the fact that the Commission had passed on the issues in *Sun* (at least in its first action) explains that holding. Both *Sun* and the opinion below were written by the same judge. In any event, an intra-circuit conflict is not ground for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901.

Neither *Cities Service* nor *Phillips* nor *Sun* presented a question of interpreting a service-agreement in order to determine the Commission's jurisdiction to grant a rate increase under Section 4.

[6] *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, *Frozen Food Express* v. *United States*, 351 U.S. 40, and *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, all involved judicial review of administrative orders made after full hearing as to questions which the agency had considered.

[Footnote continued]

The orderly way of raising petitioner's contention (and a course commonly followed) is formal intervention in the rate proceeding [7] to obtain dismissal of the filing. That would be a means of compelling the Commission to determine, either by a separate proceeding [8] or at the time the reasonableness of the rates is determined,[9] whether it has authority to grant the

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The prematurity issue involved in those cases related to the policy of conserving judicial attention for immediate and pressing controversies. The issue here, however, relates to the policy of protecting the integrity of the administrative process.

[7] After rejection of its application for rehearing, petitioner did file a notice of intervention and, as a party, will be entitled to participate in the proceedings.

[8] Where appropriate, the Commission has set jurisdictional issues for separate decision. See, *e.g.*, *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672. The Commission's power summarily to reject a Section 4 rate filing is narrowly circumscribed. See *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 202 F. 2d 899 (C.A. 3).

[9] Petitioner refers (Pet. 6, Note 1) to the duration of its payments of a previous Alabama-Tennessee rate increase subject to refund in a proceeding (Docket G-5471) in which it says no hearing has yet been held or appears imminent. Consideration of that increase necessarily awaited completion of another Commission proceeding (Docket G-5259) on the increase in the rate Alabama-Tennessee has to pay its sole supplier, Tennessee Gas Transmission Company, which Alabama-Tennessee sought to pass on to its customers. G-5259 was completed February 6, 1958, by Commission approval of refunds to be made to Alabama-Tennessee, among others. Petitioner had not intervened in G-5471 until December 9, 1957. The staff investigation of Alabama-Tennessee's rates, temporarily halted during the pendency of *United Gas Pipe Line Company* v. *Memphis Gas Co.*, 358 U.S. 103, in this Court, was resumed and completed this year. A proposal for settlement of the instant rate case submitted by Alabama-Tennessee and all of its customers, save petitioner, will be the subject of a conference of all parties with the Commission staff, which has been set for a date in November. The

rate increase. Interpretation of the service-agreement may require the taking of evidence; but in any event such procedure will permit Alabama-Tennessee and the Commission's staff to meet and analyze petitioner's contentions before the regulatory forum chosen by Congress.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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G-5471 rate will also be considered then, and, failing agreement on a settlement, will go to hearing.

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